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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1971

## No. 71-615

PAUL CHAPMAN, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

## OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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### OPINION BELOW

The judgment petitioner seeks reviewed was entered by the California Court of Appeal, First Appellate District, Division Two, on May 26, 1971, is reported at 17 Cal.App.3d 865, 95 Cal.Rptr. 242, and is reproduced as appendix E.

### JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, section 1257(3).

### QUESTIONS PRESENTED

1. Do the California Statutory procedures for the issuance of search warrants allowing seizure of al-

legedly obscene materials provide sufficient safeguards for First Amendment Rights?

2. Should the United States Supreme Court sit as the initial trial court to determine the obscenity of materials seized where the only issue yet litigated in the state courts is whether the warrant authorizing the seizure issued on probable cause to believe the material obscene?

3. Will the United States Supreme Court render an advisory opinion on a matter not at issue between the parties?

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## STATEMENT OF THE CASE

Detective Pyle of the Fremont Police Department entered the Readmore Books Store at 3:20 p.m. on September 19, 1969. In the back of that store magazines and books were displayed in an upright manner with their covers visible. After looking through a number of these magazines and books he selected two magazines, "His & Hers" and "21" as well as the paperback novel "The Unwilling Switchers" and purchased these titles from petitioner, Paul Chapman.

On September 22, 1969, Detective Pyle returned to the Readmore Books Store and purchased two magazines, "Bizarre Life" and "Eve's Rib." On this occasion the detective talked to petitioner who indicated that "there are a couple of them that are pretty good to look at."

While making this second purchase, Detective Pyle looked through a number of books and magazines which he later described in detail in his affidavit for

a search warrant. See appendix A. In this affidavit he specified and described the items sought to be seized and presented it to a magistrate. The magistrate read the affidavit, all the magazines which had been purchased and portions of the book before deciding that there was probable cause to believe this material obscene. He then issued a search warrant listing 30 titles to be seized. See appendix B. When this search warrant was executed 22 magazines and 14 books were seized.

All of the books seized, and all but eight of the magazines were described in the affidavit and specifically mentioned in the warrant. Pursuant to motion of the petitioner, the items seized which were not specifically mentioned in the warrant were suppressed by the Municipal Court and ordered returned to petitioner on February 3, 1970.

In executing the warrant, with respect to all but three titles, the officers seized only two or three copies of any one title. See appendix C. While all of the magazines seized were located in the backroom of petitioner's store only five per cent of the material in that room was seized. Numerous "nudist" magazines located in that room were not seized.

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## SUMMARY OF ARGUMENT

I. The California Statutory Provisions for issuing and contesting the validity of a search warrant are sufficiently sensitive to First Amendment rights and offer adequate protection against the suppression of protected materials. Since only a few copies of

titles a magistrate entertained reasonable cause to believe obscene were seized, for evidentiary purposes in a state criminal prosecution, there is no need for an adversary hearing prior to the issuance of the search warrant authorizing their seizure.

California Statutory Procedures for contesting the validity of a search warrant provide petitioner the right to seek immediate judicial review of the adequacy of that warrant and the legality of the seizure.

The California requirement that the magistrate must have "probable cause" to believe the material obscene prior to the issuance of a search warrant affords adequate protection against the suppression of non-obscene material, particularly where the seizure is limited to a few copies of materials a magistrate has found reasonable cause to believe are obscene, and a criminal prosecution is initiated immediately after the seizure.

II. Since petitioner seeks review of a pretrial judgment that the search warrant was adequate this Court should not make the initial determination of the obscenity of these materials. Such a determination properly belongs, in the first instance, to the State's trial court. Moreover, even if this Court were to find the material in question not obscene it would not preclude a prosecution of petitioner since other evidence may be introduced at trial.

III. Whether the officers executing this search warrant properly seized material they thought was "comparable" to that described in the warrant is not properly before this Court. Respondent has never con-

tested the validity of the magistrate's ruling that such material was improperly seized. Hence, this question presents a moot issue which this Court is without jurisdiction to entertain.

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## ARGUMENT

### I

### THE CALIFORNIA STATUTORY PROCEDURES FOR THE ISSUANCE OF SEARCH WARRANTS PROVIDE ADEQUATE SAFEGUARDS TO PROTECT AGAINST THE UNDUE SUPPRESSION OF MATERIALS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

#### A. Prior Adversary Hearing

This Court has held that confiscatory seizures of substantial quantities of printed material is impermissible unless preceded by an adversary judicial determination whether the material is obscene[1]. However, the seizure of specimens of allegedly obscene material, pursuant to a search warrant issued by an independent magistrate, for evidentiary purposes in a pending criminal prosecution does not require such a hearing. *See Hicks v. Grove Press, Inc.*, Oct. Term 1971, No. 70-114; 40 U.S.L.W. 3142; vacating 426 F.2d 643 (9th Cir. 1970). The limited seizure conducted in the instant case is not tantamount to a prior restraint upon, or a suppression of, these materials. Only a few copies of titles which a magistrate had found reasonable cause to believe obscene were seized. Hence, this is not a case like *Freedman v. Maryland*, 380 U.S. 51 (1965) where an administrative censor by refusing a

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[1] *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

license could prohibit public access to allegedly obscene materials. Nor, is it a case such as *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964), where 1,715 copies of 31 titles were seized from a wholesaler prior to distribution. In the instant case only 78 copies of 35 titles were seized from a local retailer. See appendix C. The only deprivation caused by this seizure was petitioner's profits from a suspected criminal activity—sale of obscene material which is prohibited by California Penal Code section 311.2(a).[2] Compare, *Rage Books, Inc. v. Leary*, 301 F.Supp. 546, 549 (S.D.N.Y. 1969).

The adversary hearing procedure urged by petitioner has never been required by this Court prior to an evidentiary seizure in a pending criminal case and would only serve "unnecessarily to handicap the State in their efforts to curb the dissemination of obscene material." *A Quantity of Copies of Books v. Kansas, supra,* at 215 (Harlan, J. dissenting). Moreover, California procedures for attacking the validity of a search warrant provide for a very prompt, adversary, judicial hearing following any seizure. Calif. Pen. Code § 1538.5(a, b, g). This California procedure has been approved by the appellate court of our state for use in obscenity cases because it "is one which 'the censor' knows calls for him to 'go to court' [*see Freedman v. Maryland, supra,* (1965) 380 U.S. 51, 59 . . .]" *Monica Theater v. Municipal Court*, 9 Cal.App.3d 1, 16, 88 Cal.Rptr. 71, 81 (1970).

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[2]All California Penal Code sections referred to herein are reproduced in Appendix D.

**B. Time Limits**

Petitioner contends that the hearing provided by California Penal Code section 1538.5 is inadequate to replace an adversary hearing prior to the issuance of a search warrant because that section does not establish any time limits within which the court must commence, conclude and rule in these special hearings. Although *Freedman v. Maryland,* 380 U.S. 51 (1965), relied upon by petitioner, does recommend a system which specifies certain time limits for judicial action, this Court said, "We do not mean to lay down rigid time limits or procedures. . . ." *Freedman v. Maryland, supra,* at 61. Petitioner's reliance upon *Freedman* is misplaced. That case involved an initial evaluation by a biased, administrative censor whose actions cast the burden upon the exhibitor to seek an adversary judicial determination if the censor's action was adverse and the type of hearing afforded, under court rules, did not insure prompt action. The California procedure for attacking the legality of a seizure pursuant to warrant provides that the initial consideration as to whether there might be a temporary prior restraint through seizure of the materials, is by a judge, whose duty it is to be impartial, cognizant of and sensitive to the appellate court rulings in obscenity and first amendment cases. *Monica Theater v. Municipal Court, supra.* In *Freedman* this Court pointed out that the initial decision of the Maryland Censorship Board was made without judicial participation and lacked safeguards for confining the censor's action to judicially determined constitutional limits. *Freedman v. Maryland, supra,* at 54-55, 57.

Under the California procedure petitioner had the right to a very prompt adversary judicial proceeding. California Penal Code section 1538.5 sets no time for notice or other purposes. Hence, review of the initial non-adversary judicial evaluation of the affidavit, or a de novo consideration of whether the seizure was proper could be underway within 24 hours, or less, of the seizure.[3]

Petitioner, as the defendant in a California misdemeanor prosecution, has three levels of judicial consideration to which he may subject this seizure. The magistrate who issued the warrant, the municipal court upon his motion pursuant to California Penal Code section 1538.5 to suppress the evidence and review by the appellate department of the superior court.

> "It is felt that the time within this can be processed, . . . considering that the unsuccessful defendant has had one adversary judicial proceeding already, is adequate under the elastic standards promulgated by the United States Supreme Court." *Monica Theater v. Municipal Court, supra,* 9 Cal.App.3d at 14, 88 Cal.Rptr. at 80.

*Freedman v. Maryland, supra,* requires that an administrative censorship process, to be valid must assure a prompt, final, judicial determination in order to minimize the deterrent effect of an interim and possible erroneous suppression of privileged material, Respondent submits the need for such safeguards is

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[3]Although the seizure in the instant case occurred on September 23, 1969, petitioner did not see fit to commence his attack upon the search warrant for fully two months.

not present in the instant case where only a few copies of allegedly obscene books have been seized for evidentiary purposes in a pending criminal prosecution.

Not only is the public and petitioner protected from lengthy suppression of privileged material through petitioner's right to seek immediate return of the property seized pursuant to California Penal Code section 1538.5 but they are additionally protected by his right to a speedy trial on the criminal charges. Pursuant to California Penal Code section 1382(3) petitioner, who has been charged with the misdemeanor offense of violating California Penal Code section 311.2 (Sale or Distribution of Obscene Matter), is entitled to be brought to trial within 30 days of the date of his arrest. Failure to commence trial within this time, absent a waiver by petitioner, can result in a dismissal which is a bar to further prosecution for the same offense. Calif. Pen. Code § 1387.

**C. "Probable Cause" Standard**

Petitioner also attacks the California statutory search and seizure provisions on the grounds that a finding of "probable cause" is insufficient to permit seizure of material ordinarily protected by the first amendment. His only support for this position are two administrative censorship cases, *Blount v. Rizzi*, 400 U.S. 410 (1971) and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Petitioner urges that a full-dress trial to determine whether the materials sought to be seized are obscene must be conducted before a warrant to seize any material can issue. California has long recognized that,

> "Because of the danger inherent in all censorship, a requirement of probable cause is especially important where, as here, freedom of speech and press is involved, and great caution must be exercised before permitting the seizure of books on the grounds of obscenity." *Aday v. Superior Court,* 55 Cal.2d 789, 797; 13 Cal.Rptr. 415, 420 (1961).[4]

The requirement that a warrant issue only upon a showing of probable cause to believe the materials to be seized are obscene, together with the statutory provisions for challenging the sufficiency of the warrant, coupled with the defendant's right to have the matter speedily adjudicated in an adversary hearing distinguishes this seizure for evidentiary purposes prior to the filing of a criminal complaint from an *in rem* proceeding to suppress all copies of a title thought to be obscene.

A similar point was urged by petitioner in *Luros v. California, cert. denied,* October 12, 1971 (40 U.S.L.W. 3162); Opinion below, *People v. Luros,* 4 Cal.3d 84, 89 n.5, 92 Cal.Rptr. 833, 836 n.5 (1971). Respondent submits the same result should follow in this case.

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[4]Unlike the seizure involved in the instant case, *Aday v. Superior Court, supra,* involved the seizure of thousands of copies of two books from a wholesale distributor.

## II

**THIS COURT SHOULD NOT ATTEMPT TO MAKE THE INITIAL DETERMINATION OF WHETHER THE MATERIALS SEIZED ARE OBSCENE SINCE THE ISSUE PRESENTED BELOW WAS LIMITED TO WHETHER PROBABLE CAUSE EXISTS TO BELIEVE THESE MATERIALS OBSCENE.**

Petitioner contends that the material involved in the instant case is not obscene and is therefore entitled to constitutional protection. Respondent respectfully submits that the only question presented to the court below was whether *reasonable cause* existed to believe the material involved herein is obscene. A trial on the merits of the question of obscenity has yet to be held. Wherefore, we submit that petitioner is premature in urging this Court to review this material and determine its obscenity. The State of California has undertaken to prosecute petitioner for a violation of its Penal Code. It cannot be said, nor has petitioner alleged, that this prosecution has been undertaken in bad faith and without hope of obtaining a valid conviction. There is no showing that petitioner is being harassed by the prosecution or that there are other extraordinary circumstances establishing irreparable injury. Wherefore, under the reasoning of *Perez v. Ledesma,* 401 U.S. 82, 84-85 (1971), we respectfully request this Court to leave the initial determination of the obscenity of this material to be resolved by the finder of fact in the criminal prosecution. Cf. *Younger v. Harris,* 401 U.S. 37 (1971).

Even if this Court were to conclude that the material seized was not obscene, in the constitutional

sense, that finding would not be dispositive of the prosecution. Additional evidence, beyond the materials themselves could be introduced to support a criminal prosecution against petitioner. Compare, *Ginzburg v. United States*, 383 U.S. 463 (1966); and Calif. Pen. Code § 311.5.

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## III

**THE PEOPLE OF THE STATE OF CALIFORNIA NEVER HAVING CONTESTED THE MAGISTRATE'S RULING THAT THE MATERIAL NOT DESCRIBED IN THE WARRANT WAS ILLEGALLY SEIZED, THAT ISSUE WAS NOT BEFORE THE COURT BELOW, IS NOT AT ISSUE BETWEEN THESE PARTIES AND SHOULD BE TREATED AS MOOT.**

Petitioner complains of the seizure of "comparable" material to that described in the warrant. The search warrant described 30 titles. See Appendix B. While executing this warrant the officers seized several titles not described therein but which they felt were "comparable" to the type of material which the warrant authorized them to seize. Pursuant to petitioner's motion, the municipal court ordered these "comparable" materials suppressed. The prosecution has never appealed that ruling.

California Penal Code section 1538.5 provides that upon the granting of the defendant's motion to suppress evidence, that evidence "shall not be admissible against the moyant at any trial or other hearing unless further proceedings . . . are utilized by the

people." Inasmuch as the People did not contest the ruling of the municipal court they cannot use these "comparable" materials against petitioner.

After holding that the materials seized pursuant to warrant were admissible, the California Court of Appeal turned its attention to the proper disposition of the "comparable" materials seized by the officers while executing the warrant. That court held the magistrate's order returning this material to petitioner improper. *People v. Chapman,* 17 Cal.App.3d 865, 871, 95 Cal.Rptr. 242, 246 (1971).

> "The warrant constituted valid authorization for the search and seizure with respect to the named books but not with respect to the other property . . . It should be noted, however, that if any of the property seized other than the named books was contraband, petitioners are not entitled to its return. *(Steele v. United States, No. 1,* 267 U.S. 489, 503, 505 [45 S.Ct. 414, 69 L.Ed. 757]; *United States v. Old Dominion Warehouse, Inc.,* 10 F.2d 736, 737-738.) Any property in possession of petitioners in violation of section 311 of the Penal Code was, of course, contraband. The seized property other than the named books is not before us . . . We are therefore unable to determine whether all the property other than the named books must be returned to petitioners or whether some of it is to be withheld. Additional proceedings will be necessary in order to make that determination, and they should be had in the municipal court. . . ." *Aday v. Superior Court,* 55 Cal.2d 789, 800, 13 Cal.Rptr. 415, 422 (1961).

Thus, the judgment of the Court of Appeal which petitioner seeks reviewed by this Court, does not allow the use of these "comparable" materials against him. It merely provides that this material should not be *returned* to him if found to be obscene. There is neither authority for, nor threat of its admission into evidence at the criminal trial. The respondent has never contended otherwise. Hence, whether the "comparable" material was properly seized or suppressed was never presented to the court below.

Very early in its history this Court established the principle that it would not render advisory opinions. *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792), as interpreted in *Muskrat v. United States,* 219 U.S. 346, 351-353 (1911). Before this Court will entertain an issue presented to it by one of the parties there must exist a controversy over it between the parties to the suit. *Local No. 8-6, Oil Chemical Workers' Union v. Missouri,* 361 U.S. 363, 367 (1960). Respondent has never sought review of the magistrate's ruling that the material seized while executing the warrant which the officers felt was "comparable" to that described in the warrant was improperly seized. We respectfully submit that since this issue presents a moot question this Court is without jurisdiction to entertain it. *North Carolina v. Rice* (Oct. Term. 1971, No. 70-77), 40 U.S.L.W. 4073 (Dec. 14, 1971); *Henry v. Mississippi,* 379 U.S. 443, 447 (1965); *United States v. Alaska Steamship Co.,* 253 U.S. 113, 116 (1920).

## CONCLUSION

Narrow evidentiary seizures pursuant to the institution of criminal proceedings must be differentiated from mass seizures and consequent suppression of allegedly obscene material. Seizures such as the one complained of in the instant case, have been consistently upheld because a magistrate exercises an independent check on the judgment of the prosecuting authorities prior to any restraint being imposed on the material and, the restraint runs only against named publications and is not extensive prior to an adversary hearing which the defendant may compel shortly after the seizure. Compare, *Mishkin v. New York*, 383 U.S. 502, 513 (1966); *Kingsley Books v. Brown*, 354 U.S. 436 (1957). Wherefore, we respectfully submit the petition for certiorari should be dismissed.

Dated, February 17, 1972.

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**(Appendices Follow)**

## Appendix A

Municipal Court for the
Fremont-Newark-Union City Judicial District
County of Alameda, State of California

State of California
County of Alameda—ss.

AFFIDAVIT FOR SEARCH WARRANT

Leroy Pyle, being first duly sworn, deposes and says:

That on or about September 22, 1969, in the City of Fremont, County of Alameda, State of California, the crime of 311.2 of the Penal Code of the State of California, to wit: the distribution and possession with intent to distribute obscene matter was committed by Paul Chapman in the manner following, to wit: by selling obscene magazines to an agent of the Fremont Police Department and by possessing quantities of obscene magazines and books for sale.

That affiant has, and there is just, probable and reasonable cause to believe, and he does believe, that there are now in the possession of Paul Chapman and in and upon the premises and building known and designated as and commonly called The Readmore Books Store, at 129 Anza Street, Fremont, in the said County of Alameda, State of California, including all rooms and buildings used in connection with said premises and building and adjoining the same and in a receptacle or safe therein, certain articles, items and property which were obscene, and which were used as a means of committing a Misdemeanor, and which were and are intended to be used as a means of com-

mitting a public offense, and which articles, items and property constitute evidence which tends to show that a Misdemeanor has been committed and that the said Paul Chapman committed said Misdemeanor.

That the said articles and property are described particularly as follows, to wit:

1. Magazines entitled **Eve's Rib,** Vol. 1 No. 3
2. Magazines entitled **His & Hers,** No. 4
3. Magazines entitled **"21",** Vol. 2 No. 4
4. Magazines entitled **French Curves,** No. 1
5. Magazines entitled **[N]ude Mood**
6. Magazines entitled **Wendys Wild Weekend**
7. Magazines entitled **Legs That Dance To Elmers Tune**
8. Magazines entitled **Adult Words and Pictures,** Vol. 1 No. 3
9. Magazines entitled **Peachy,** No. 1
10. Magazines entitled **This Is Our Life,** No. 10
11. Magazines entitled **Comfy, No. 1**
12. Magazines entitled **Hefty,** No. 31
13. Magazines entitled **Femmefare,** No. 1
14. Magazines entitled **Stud,** No. 6
15. Magazines entitled **Seven Days of Sherry,** No. 2
16. Paperback books entitled **The Unwilling Switchers** Saber Book
17. Paperback books entitled **Lesbian Witch**
18. Paperback books entitled **The Producers Wife**
19. Paperback books entitled **The Debauched Divorcee**
20. Paperback books entitled **Nazi Joy Camp**
21. Paperback books entitled **Assignment Sex**
22. Paperback books entitled **I Led A Double Life**
23. Paperback books entitled **Pleasure Campus**
24. Paperback books entitled **Partime (sic) Wives**
25. Paperback books entitled **The Sex of Angels**
26. Paperback books entitled **Bishops Gambol**
27. Paperback books entitled **Doggie And the Widow,** No. 5023
28. Paperback books entitled **Clitty Clitty Bang Bang**
29. Paperback books entitled **Mistress of Mayhem,** No. 205
30. Paperback books entitled **The Story of My Life**

That the following facts establish the existence of grounds for the issuance of a search warrant, and further, establish probable cause for believing that said grounds exist:

Affiant is a detective with the Fremont Police Department engaged in the vice detail. On September 22, 1969, affiant personally entered the bookstore called Readmore Books, located at 129 Anza Street, Fremont. Affiant saw a magazine display rack and a paperback book display rack containing several magazines and books. Affiant looked at parts of all the following magazines: **Eve's Rib,** Vol. 1, No. 3; **His & Hers,** No. 4; **"21",** Vol. 2, No. 4; **French Curves,** No. 1; **[N]ude Mood; Wendy's Wild Weekend; Legs That Dance to Elmer's Tune; Adult Words and Pictures,** Vol. 1, No. 3; **Peachy,** No. 1; **This Is Our Life,** No. 10; **Comfy,** No. 1; **Hefty,** No. 31; **Femmefare,** No. 1; **Stud,** No. 6; and, **Seven Days of Sherry,** No. 2. Affiant noted at that time that all of the above-mentioned magazines consist mostly of photographs of nude men and women in various positions with emphasis on the private parts of those persons. Affiant saw that in all of the above magazines, the contents were mainly photographs with occasional stories in them. All of the above-mentioned magazines contain several photographs of nude women with emphasis on their vaginas and pubic hair. Most of the above-mentioned magazines contained stories concerning oral copulation, oral intercourse, sexual intercourse, homosexual and lesbian conduct. All of these stories were very explicit about sexual conduct. All of the above-mentioned magazines depict photographs of nude men

or women showing the penis and pubic hair of the men. Most of the above-mentioned magazines depict men and women in various positions and embraces, including the touching of the penis and vagina, and many depict the mouth of one person very near the penis or vagina of another. All of these magazines are only concerned with nude photographs and lewd and suggestive stories. Many of the above-mentioned magazines depict the vagina and anmus (sic) of women in various positions, and with the legs of the women spread very wide. Many photographs depict naked women in embraces with each other. Most of the photographs in the magazine depict a naked woman lying down with legs spread so that her vagina, pubic hair and anmus (sic) are exposed.

Affiant selected two of the above-mentioned magazines titled **Bizarre Life**, No. 10, and **Eve's Rib**, Vol. 1, No. 3, and purchased them from Paul Chapman for $6.83. Affiant also looked at parts of the following paperback books: **The Unwilling Switchers**, a Saber Book, **Lesbian Witch**, **The Producers Wife**, **The Debauched Divorcee**, **Nazi Joy Camp**, **Assignment Sex**, **I Led a Double Life**, **Pleasure Camps**, **Partime** (sic) **Wives**, **The Sex of Angels**, **Bishops Gambol**, **Doggie and the Widow**; No. 5023, **Clitty, Clitty, Bang Bang**, **Mistress of Mayhem**, No. 205, and **The Story of My Life**. Affiant read parts of all of the above-mentioned paperback books and found them all to contain descriptions of at least one of the following types of acts: sexual intercourse, sodomy, oral copulation, anal intercourse, fellatio, homosexual and lesbian conduct. Affiant found that the books each contain several passages in-

volving sexual conduct with flimsy plots. Affiant found that all these books contained graphic description of various types of intercourse in page after page of the books. The main theme of all of the above books was to describe oral copulation, anal intercourse and sexual intercourse in great detail time after time.

Affiant believes that all of the above magazines and paperbacks are obscene in that they appeal to prurient interests.

Affiant knows that the judge has seen the "21" and **His & Hers** magazines and was of the opinion that the magazines were obscene. Affiant also knows that the judge has read parts of the paperback book, entitled **The Unwilling Switchers** and was of the opinion that it was obscene.

Affiant asks that this search warrant contain a direction allowing nighttime service as affiant was informed by a woman who was working at the above-mentioned book store that Paul Chapman comes in and works from 6:00 p.m. until 9:00 p.m. Also, on September 22, 1969, when affiant purchased the two magazines, it was 8:00 p.m. Due to the foregoing information, affiant intends to serve this search warrant after 6:00 p.m. at nighttime. Affiant was also informed by the woman clerk that Paul Chapman puts out the above-mentioned obscene books and magazines for display and sale after he arrives at the store, at 6:00 p.m.

Affiant intends to show to the judge who issues this search warrant the contents of the following magazines and books: **Eye's Rib**, Vol. 1, No. 3; **His & Hers**,

No. 4; "21", Vol. 2, No. 4; **The Unwilling Switchers; Doggie and the Widow**; and, **Clitty, Clitty Bang Bang.**

Wherefore, affiant prays that a search warrant issue commanding that an immediate search be made of the person of the said Paul Chapman and the premises and building described herein for the articles and property above described and that the same be brought before a magistrate and disposed of according to law.

Subscribed and sworn to before me on September 23, 1969.

.....

Judge of the Municipal Court for the
Fremont-Newark-Union City Judicial District
County of Alameda, State of California

.....

(Affiant)

## Appendix B

Municipal Court for the
Fremont-Newark-Union City Judicial District
County of Alameda, State of California

State of California
County of Alameda—ss.

SEARCH WARRANT

The People of the State of California to Any Sheriff, Constable, Marshal, Policeman or Peace Officer In the County of Alameda, State of California

Proof by affidavit having been this day made before me by Leroy Pyle that heretofore and on or about September 22, 1969, in the City of Fremont, County of Alameda, State of California, the crime of 311.2 of the California Penal Code was committed by Paul Chapman in the manner following, to wit: by selling and possessing with intent to distribute obscene magazines and books.

That the following described articles and property (were used and are intended to be used as the means of committing the said public offense):

1. Magazines entitled **Eve's Rib,** Vol. 1 No. 3
2. Magazines entitled **His & Hers,** No. 4
3. Magazines entitled **"21",** Vol. 2 No. 4
4. Magazines entitled **French Curves,** No. 1
5. Magazines entitled **[N]ude Mood**
6. Magazines entitled **Wendys Wild Weekend**
7. Magazines entitled **Legs That Dance To Elmers Tune**
8. Magazines entitled **Adult Words and Pictures,** Vol. 1 No. 3
9. Magazines entitled **Peachy,** No. 1
10. Magazines entitled **This Is Our Life,** No. 10
11. Magazines entitled **Comfy, No. 1**
12. Magazines entitled **Hefty,** No. 34
13. Magazines entitled **Femmefare,** No. 1
14. Magazines entitled **Stud,** No. 6
15. Magazines entitled **Seven Days of Sherry,** No. 2
16. Paperback books entitled **The Unwilling Switchers** Saber Book
17. Paperback books entitled **Lesbian Witch**
18. Paperback books entitled **The Producers Wife**
19. Paperback books entitled **The Debauched Divorcee**
20. Paperback books entitled **Nazi Joy Camp**
21. Paperback books entitled **Assignment Sex**
22. Paperback books entitled **I Led A Double Life**
23. Paperback books entitled **Pleasure Campus**
24. Paperback books entitled **Partime (sic) Wives**
25. Paperback books entitled **The Sex of Angels**
26. Paperback books entitled **Bishops Gambol**
27. Paperback books entitled **Doggie And the Widow,** No. 5023
28. Paperback books entitled **Clitty Clitty Bang Bang**
29. Paperback books entitled **Mistress of Mayhem,** No. 205
30. Paperback books entitled **The Story of My Life**

That said articles, items and property constitute evidence which tends to show that a misdemeanor was committed and that the said Paul Chapman committed said misdemeanor. That there is just, probable and

reasonable cause to believe, and said affiant does believe that the above articles and property are now concealed upon the person of Paul Chapman and in and upon those certain premises, including all rooms and buildings used in connection with the premises and adjoining same, and in any receptacle or safe therein, which premises are commonly called and designated as The Readmore Books Store at 129 Anza Street, Fremont, County of Alameda, State of California.

You Are Therefore Commanded in the day or nighttime to make immediate search of the person(s) of Paul Chapman and of the premises above described for the said articles and property and if you find the same or any part thereof to bring it forthwith before me for disposition according to law.

Given Under My Hand and dated this 23rd day of September, 1969.

.....

Judge of the Municipal Court for the
Fremont-Newark-Union City Judicial District
County of Alameda, State of California

## Appendix C

### RETURN ON SEARCH WARRANT

ss Fremont

State of California
County of Alameda

I, the undersigned, make this return to the within Search Warrant. I received said warrant on the 23 day of September, 1969, and under its authority I, on the day of its date, diligently searched the premises described as follows, to wit: The Readmore Books store at 129 Anza St., Fremont, and I there discovered the below listed inventory

Inventory

Magazines

1. 3 ea **"21"** volume 3 number 1
2. 1 ea **"21"** volume 2 number 4
3. 2 ea **Comfy** Number 1
4. 2 ea **Studio One** issue 1
5. 3 ea **Femmefare** Number one
6. 3 ea **Stud** number 6
7. 2 ea **Seven days of Sherry** #2
8. 1 ea **Eves Rib** Vol. 1 no. 3
9. 3 ea **Hefty** No. 31
10. 1 ea **His & Hers** No. 4
11. 2 ea **Wendys Wild Weekend** No. 1
12. 3 ea **Teen Temptress** No. 1

13. 3 ea **Nude Mood**
14. 1 ea **Legs that danced to Elmers Tune #2**
15. 3 ea **Legs that danced to Elmers Tune #3**
16. 1 ea **French Curves #1**
17. 3 ea **Adult words and Pictures** Vol. 1 no. 3
18. 1 ea **Sweety** Vol. 1 No. 1
19. 1 ea **Swappers** Vol 1 No. 3
20. 3 ea **Nude Circle #3**
21. 2 ea **Sun Youth** Vol 1, No. 4
22. 3 ea **Nudist Fare #2**

Page one of two pages

I, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

.....

Subscribed and sworn to before me this

..... day of ....., 19.....

.....

.....

.....

County of .....
State of California

## RETURN ON SEARCH WARRANT

ss Fremont

State of California
County of Alameda

I, the undersigned, make this return to the within Search Warrant. I received said warrant on the 23 day of September, 1969, and under its authority I, on the day of its date, diligently searched the premises described as follows, to wit: The Readmore Books Store at 129 Anza St., Fremont, and I there discovered the below listed inventory

(Page two of two pages)

---

Inventory
Paper Backs

1. 3 ea **The Unwilling Switcher's**
2. 3 ea **Lesbian Witch**
3. 3 ea **The Producers Wife**
4. 1 ea **The Debauched Divorcee**
5. 1 ea **Nazi Joy Camp**
6. 4 ea **Assignment Sex**
7. 6 ea **Pleasure Campus**
8. 5 ea **Part Time Wives**
9. 1 ea **The Sex of Angels**
10. 1 ea **The Bishops Gambol**
11. 1 ea **Clitty Clitty Bang Bang**
12. 1 ea **Mistress of Mayhem**
13. 1 ea **Pimp—The Story Of My Life**
14. Nothing further, total of fourteen (sic) separate titles.

I, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

.....

Subscribed and sworn to before me this
..... day of ....., 19.....

.....

.....

.....

County of .....
State of California

## Appendix D

### PENAL CODE

§ 311. *Definitions*

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any

picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly de-

fined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

§ 311.2 *Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state*

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a ~~misdemeanor~~.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

§ 311.5 *Advertising or promoting sale or distribution; solicitation*

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

§ 1382. *Grounds.*

The Court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: . . .

(3) Where the trial has not been postponed upon the defendant's application, if the defendant in a misdemeanor case in an inferior court, is not brought to trial within 30 days after he is arrested and brought within the jurisdiction of the court, . . .

§ 1387. *Dismissal as Bar—Felony Excepted.*

An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony.

§ 1538.5 *Motion to return property or suppress evidence*

(a) *Grounds*

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because the warrant is insufficient on its face; the property or evidence obtained is not that described in the warrant; there was not probable cause for the issuance of the warrant; the method of execution of the warrant violated federal or state constitutional standards; or there was any other violation of federal or state constitutional standards.

(b) *First hearing*

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) *Evidence*

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) *Effect of granting motion*

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) *Return of Property*

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) *Felony; motion at preliminary hearing*

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) *Misdemeanor; pre-trial motion at special hearing*

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard

prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) *Motion at trial*

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court. * * *

(i) *Felony; renewal of motion at special hearing; review*

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of

mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) *Relitigation of question after grant of motion; new evidence, review*

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evi-

dence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o) * * *, unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) *Release of defendant pending resumption of proceedings in trial court*

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j) * * *, the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the

trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a non-capital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(l) *Stay; time for trial; dismissal; continuance; bail or release*

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of * * * this state * * * of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o) * * *, the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which

is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) *Exclusive pre-trial remedy; review on appeal after conviction*

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case not withstanding the fact that such judgment of conviction is predicated

upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) *Motions on other grounds; existing law and procedure*

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering the law of standing to raise the issue of an unreasonable search or seizure; the law relating to the status of the person conducting the search or seizure; the law relating to the burden of proof regarding the search or seizure; the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) *People's petition for mandate or prohibition; notice of intention*

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a

criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

## Appendix E

*In the Court of Appeal*
*State of California*
*First Appellate District*

DIVISION TWO

1 Criminal No. 9131

The People of the State of California,
Plaintiff and Respondent,
vs.
Paul Chapman,
Defendant and Appellant.

OPINION

The appellate department of the Superior Court of Alameda County has certified to this court on its own motion and we have accepted the instant case which involves a prosecution under Penal Code section 311.2 (sale or distribution of obscene matter). The case reached the appellate department on appeal from the denial by the municipal court of a motion to suppress evidence seized under a search warrant, the motion being made pursuant to Penal Code section 1538.5 et seq. The appellate department affirmed the order of the municipal court as to books and magazines *purchased by the officer from defendant* and alleged to be obscene. *The order was reversed as to allegedly ob-*

*scene books and magazines which were seized under a search warrant issued ex parte.*

The facts are undisputed. On September 23, 1969, a search warrant authorizing the search of the Readmore Books Store in Fremont was issued by the Municipal Court for the Fremont-Newark-Union City Judicial District of the County of Alameda. The search warrant *described by name* 30 magazines and paperback books alleged to be in the possession of Paul Chapman and on the premises of the Readmore Books Store at 129 Anza Street in Fremont. The warrant issued upon the affidavit of Leroy Pyle, a detective of the Fremont Police Department who had previously purchased some of the magazines and had looked at parts of the paperback books. The affidavit described the pictures and activity depicted in the material in graphic detail and concluded with the belief of the detective that the magazines and paperback books were obscene and appealed to prurient interest. The affidavit also alleged that the judge had seen the magazines "21" and "His and Hers" and that he had read parts of the paperback book entitled "The Unwilling Switchers" and was of the opinion the matter was obscene.

On September 23, 1969, pursuant to the authorization in the warrant, the Readmore Books Store was searched and the magazines and paperback books seized were listed on the return to the search warrant. A total of 47 magazines and 31 paperback books were taken. Some magazines not named in the search warrant were taken.

On September 23, 1969, a complaint issued in the Municipal Court for the Fremont-Newark-Union City Judicial District, County of Alameda, charging Paul Chapman in two counts with committing misdemeanors. Count one set forth a violation of section 311.2 of the Penal Code on September 19, 1969, in that he "willfully and knowingly offered to distribute and had in his possession with intent to distribute, and distributed obscene matter, to wit: two obscene magazines and an obscure paperback book."

The second count alleged that on September 22, 1969, the defendant violated section 311.2 of the Penal Code in that he "willfully and knowingly offered to distribute and had in his possession with intent to distribute, and distributed obscene matter, to wit: an obscene magazine."

On September 23, 1969, at the time of the seizure under the search warrant, defendant Paul Chapman was arrested pursuant to an arrest warrant and released on $1,000 bail.

On September 29, 1969, an amended complaint issued charging Chapman with additional counts of violating section 311.2 of the Penal Code, naming paperback books and magazines seized in the search.

On December 23, 1969, defendant Chapman made a motion to suppress evidence and for the restoration of property seized under the search warrant pursuant to sections 1538.5, 1539 and 1540 of the Penal Code.

On February 11, 1970, the municipal court ordered that the books seized by the police which were not listed on the warrant be returned to the defendant

and denied the motion to suppress as to all the other books seized in the search warrant with the exception of "Pimp: The Story of My Life," which it found to be not obscene within the constitutional sense.

On February 20, 1970, defendant Chapman filed a notice of appeal to the appellate department of the superior court.

On July 15, 1970, the appellate department of the superior court entered the order with which we are concerned. In making said ruling, the department relied upon *People v. de Renzy* (1969) 275 Cal.App.2d 380 [79 Cal.Rptr. 777], and explains its action by pointing to the holding in *de Renzy* (p. 386) where the court states that "law enforcement officers, acting under authority of a search warrant, may seize at least one copy of an alleged obscene book, film, or other material when necessary for use as evidence in a later adversary proceeding, without doing violence to the First or Fourth Amendment," but in another portion of the opinion it is stated that "We recognize that there may be circumstances where, by fortuity, obscene matter may be produced by the state without need of search or seizure or court process, e.g.; *books offered for public sale. In such cases any seizure without prior adversary proceedings obviously would be constitutionally impermissible*" (p. 384; italics added) and that feeling governed by the latter statement it ruled as it did even though it considered the observation dicta.

The defendant's contentions before the appellate department were: (1) that Penal Code, section 311.2,

was unconstitutional by reason of the United States Supreme Court's decision in *Stanley v. Georgia* (1969) 394 U.S. 557 [22 L.Ed.2d 542, 89 S.Ct. 1243], and (2) that a prior adversary hearing must be conducted before a search warrant may be issued for a seizure of books and magazines alleged to be obscene, when such publications are available for public sale.

As to the first contention, the appellate department ruled that the section attacked was constitutional and was not affected by *Stanley v. Georgia, supra,* a ruling that anticipated the holding of our Supreme Court in *People v. Luros* (1971) 4 Cal.3d 84 [92 Cal. Rptr. 833, 480 P.2d 633], wherein a like argument was held to be without merit.

As to the second contention, we likewise conclude that the *Luros* case disposes of it.

In *Luros,* the trial court had set aside an indictment under Penal Code section 311.2, because the prosecution failed to present evidence to the grand jury of contemporary community standards. The trial court recognized that its ruling was in conflict with the holding of *Aday v. Superior Court* (1961) 55 Cal.2d 789, 798 [13 Cal.Rptr. 415, 362 P.2d 47], and *People v. Aday* (1964) 226 Cal.App.2d 520, 531-532 [38 Cal.Rptr. 199], but was of the view that those cases had been overruled by more recent decisions. However, our Supreme Court in *Luros* points out that the two *Aday* cases were correctly decided and are the law today. In *Aday v. Superior Court, supra,* the magistrate had issued a search warrant which authorized seizure of two named books alleged to be obscene; the magis-

trate had read portions of the two named books which had been purchased by a police officer before issuing the warrant, but had not receievd evidence as to contemporary community standards; the Supreme Court examined the books in light of the test for obscenity set forth in *Roth v. United States* (1957) 354 U.S. 476, 487-489 [1 L.Ed.2d 1498, 1508-1510, 77 S.Ct. 1304], " 'whether to the average person, applying contemporary community standards, the dominent theme of the material taken as a whole appeals to the prurient interest,' " *(Aday v. Superior Court, supra,* p. 798) and came to the conclusion that there was probable cause to believe them obscene, and that it is "not necessary . . . to . . . receive evidence as to contemporary community standards in order to determine the issue of probable cause." *(Aday v. Superior Court, supra,* p. 798.) The Supreme Court in *Luros* quotes from the *Aday* case as follows: " 'Where, as here, the seizure occurs under a warrant, *an ex parte determination* of the issue of obscenity, so far as probable cause is concerned, has taken place before issuance of the warrant, and immediately *after the seizure* a determination of the issue to that extent can be obtained in *adversary proceedings* by controverting the warrant under sections 1539 and 1540 of the Penal Code. In the event the owner is unsuccessful in that proceeding, a final determination as to obscenity will be had in the criminal action which will ordinarily follow within a reasonable time, or other remedies such as mandamus will be available to secure return of the property.' *(Aday v. Superior*

*Court, supra,* 55 Cal.2d at p. 799.)" *People v. Luros; supra,* p. 88; italics added.)

Subsequent to the *Aday* cases, the Legislature added section 1538.5 to the Penal Code (Stats. 1967, ch. 1537, § 1, p. 3652), which provides that a defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search and seizure, with attendant provisions for review by mandamus or appeal, the remedy employed by the defendant in this case and the avenue by which he reached this court.

The issue of the necessity for a prior adversary hearing was before the United States Supreme Court in *Perez v. Ledesma* (1971) ..... U.S. ....., [27 L.Ed.2d 701, 91 S.Ct. .....]. In that case, a three-judge federal court had ruled that the arrest of a newsstand operator and the seizure of allegedly obscene material were invalid *for lack of a prior adversary hearing on the character of the seized materials,* and had entered a suppression order requiring the return of all the seized material. The United States Supreme Court based its reversal of the order on *Younger v. Harris,* decided the same day,[1] and therefore had no occasion to consider the holding of the three-judge court that the seizures and the arrest of Ledesma could not be constitutionally undertaken prior to an adversary judicial determination of obscenity.

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[1]In *Younger v. Harris* (1971) ..... U.S. ....., ..... [27 L.Ed.2d 669, ....., 91 S.Ct. .....], the United States Supreme Court held that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.

In a footnote in a concurring and dissenting opinion by Mr. Justice Brennan, however (..... U.S. ..... [27 L.Ed.2d 712-713, fn. 2]), the United States Supreme Court noted that it had affirmed a judgment in a case containing a contrary view as to the necessity of a hearing prior to an arrest for obscenity in *Milky Way Productions, Inc. v. Leary* (1969) 305 F. Supp. 288, 295-297, affirmed *sub nom, New York Feed Co., Inc. v. Leary* (1970) 397 U.S. 98 [25 L.Ed.2d 78, 90 S.Ct. 817].

The court in *Milky Way Productions, Inc. v. Leary* characterized the asserted requirement of a preliminary adversary hearing as a "novelty" that had gained acceptance in several courts, but it could find nothing in the First Amendment to mandate its acceptance of such an innovation, concluding that "traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity." The court then ruled: "At any rate, we find no warrant in the First Amendment or the cases that give it full meaning for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases." *(Milky Way Productions, Inc. v. Leary, supra,* p. 297.)

There have been a number of opinions entered by the federal district courts of California requiring magistrates to conduct prior adversary hearings before issuing a search warrant. On March 29, 1971, the United States Supreme Court vacated the Ninth Circuit Court of Appeals affirmance of those opinions

*(Demich, Inc. v. Ferdon* (1970) 426 F.2d 643). (See *Ferdon v. Demich, Inc.* (1971) ..... U.S. ..... [28 L.Ed. 2d 528, ..... S.Ct. .....].)

The language from the *de Renzy* opinion relied upon by the appellate department is clearly dicta, uttered without citation of authority and is in direct conflict with the holding of that case and an accepted line of authority supporting narrow evidentiary seizures. (See *Mishkin v. New York* (1966) 383 U.S. 502, 513 [16 L.Ed.2d 56, 64-65, 86 S.Ct. 958], and *Rage Books, Inc. v. Leary* (1969) 301 F.Supp. 546.)

There remains for disposition the order made herein whereby all the publications that were not named in the search warrant were to be returned to the defendant. Such order was improper and must be vacated under the holding of *Aday v. Superior Court, supra,* p. 800.

The judgment reversing the municipal court order which denied the motion to suppress certain allegedly obscene books and magazines is reversed. The order of the municipal court directing the return of such obscene material as was not named in the search warrant is vacated.

Shoemaker, P.J.

Taylor, J., and Kane, J., concurred.

Filed May 26, 1971,
Clifford C. Porter, Clerk.